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**NOT TO BE PUBLISHED OPINION**

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RENDERED: MAY 21, 2009

NOT TO BE PUBLISHED

# Supreme Court of Kentucky

# FINAL

2006-SC-000364-MR

DATE 6/11/09 Kelly Keaber D.C.

THOMAS GRIFFITH FULLER, JR.

APPELLANT

V. ON APPEAL FROM PENDLETON CIRCUIT COURT  
HONORABLE ROBERT MCGINNIS, JUDGE  
NO. 05-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Thomas Griffith Fuller, Jr., appeals as a matter of right from the April 19, 2006 Judgment of the Pendleton Circuit Court convicting him of sodomy in the first degree and sentencing him to twenty years in prison. Fuller's conviction is based on the sexual abuse of his younger step-sister, D.R., during late November or early December of 2002. On appeal, Fuller now contends that the trial court erred by (1) trying him for sodomy once in juvenile court then again in circuit court, thus violating his rights against double jeopardy; (2) failing to remand the case back to juvenile court after the grand jury indicted Fuller on fewer counts than the juvenile court; (3) allowing the Commonwealth to obtain a fourteen-month delay between the close of its investigation and the motion to transfer Fuller's case to circuit court, which Fuller alleges, violated

his right to a speedy trial and to an expeditious resolution of his juvenile proceedings; (4) permitting the Commonwealth to introduce evidence of Fuller's prior acts of sexual abuse in violation of KRE 404(b); and (5) allowing the Commonwealth to question the social worker about the victim's demeanor, which arguably bolstered the victim's credibility in violation of KRE 103. Convinced that Fuller's claims do not amount to reversible error, we affirm.

### **RELEVANT FACTS**

During 2001 and early 2002, the then nine-year-old victim in this case, D.R., was living with her mother Penny, her younger brother D.B., her stepfather Tom Fuller Sr., and her three stepbrothers, A.F., R.F., and the then fifteen-year-old defendant, Tommy Fuller. After informing her school counselor that she and D.B. were being physically abused at home, D.R. and her brother were removed from their home and sent to Maplewood Children's Home in Northern Kentucky. While D.R. and D.B. were living at Maplewood, D.R. first revealed that she had been sexually abused by her stepbrother, Tommy Fuller, during the year prior to her removal. After staying at Maplewood for approximately a month and a half, D.B. left Maplewood and returned home at his own request, but because D.R. insisted that she did not want to return home and would rather be adopted, she was placed in foster care.

After D.R. revealed that Fuller had sexually abused her, State Police Detective Chris Jaskowiak began an investigation into D.R.'s allegations. Detective Jaskowiak took D.R. to the Children's Advocacy Center of Northern Kentucky, where D.R. was interviewed and given a physical examination. The

physical exam revealed that D.R. had no sexually transmitted diseases, no medical abnormalities, and no physical evidence of sexual abuse. Although D.R. was not able to give a full statement during this first interview, a few months later, on August 25, 2003, D.R. gave a lengthy statement detailing her abuse.

Based on D.R.'s statement and Detective Jaskowiak's investigation, on December 18, 2003, the Commonwealth filed a juvenile petition charging Fuller with ten counts of sodomy in the first degree and ten counts of sexual abuse in the first degree. After granting a discovery extension and a continuance, the Juvenile Court ultimately set Fuller's adjudication hearing date for December 9, 2004. On September 24, 2004, the Commonwealth filed a motion requesting that pursuant to KRS 421.350, it be allowed to take the testimony of the two child witnesses, D.R. and D.B., either by a recording prior to the adjudication proceeding or in a separate room outside of the presence of Fuller. The Commonwealth argued that this motion was necessary because the children "would suffer additional serious emotional distress" and would likely be "unable to reasonably communicate" if the defendant were present during their testimonies. Fuller did not object to this motion. After granting the Commonwealth's request, the trial court set a hearing date for November 16, 2004, in order to take the testimony of D.R. and D.B.

One day before the KRS 421.350 hearing was to take place, on November 15, 2004, the Commonwealth filed a motion to transfer Fuller's case to circuit court so that he could be tried as an adult. The motion was noticed to be

heard during the previously scheduled hearing date of December 9, 2004. On November 16, 2004, D.R. and D.B. appeared in Juvenile Court to give testimony regarding Fuller's sexual abuse.<sup>1</sup> During her testimony, D.R. described the appearance of Fuller's penis and how its appearance would change. D.R. stated that from the time she was seven until she was nine and a half, Fuller had touched her genitals, made her touch his penis, and made her put her mouth on his penis. D.R. revealed that over the two-year period, some form of abuse had occurred almost every day and that she was forced to put her mouth on Fuller's penis approximately three to four times a week. D.B., D.R.'s brother, also testified during this hearing, revealing that on one occasion, he saw D.R. and Fuller naked and thought it looked like they were wrestling. Following the children's testimonies, Fuller's case was adjourned until the previously set date to consider the Commonwealth's motion to transfer.

On December 9, 2004, the Commonwealth called several witnesses in support of its motion to transfer Fuller to circuit court, including Detective Jaskowiak; Penny Fuller, D.R.'s mother; Don Johnson, Fuller's Department of

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<sup>1</sup> At the time of the KRS 421.350 hearing, Fuller's brother, R.F. had also been charged with sexual abuse and was a co-defendant with Fuller. R.F.'s charge was based on D.B.'s statement to a counselor at Maplewood that R.F. had abused him repeatedly during the same period as D.R.'s abuse by Fuller. During the KRS 421.350 hearing, however, D.R. testified that R.F. had also abused her for a brief period, but had ended the abuse after a month because he said he thought it was wrong. Prior to Fuller's December 9, 2004 transfer hearing, the Commonwealth moved to dismiss the charges against R.F. due to D.R.'s testimony that R.F. had felt remorse about his conduct and believed it was wrong. The Juvenile Court granted the Commonwealth's motion and dismissed the charges against R.F. without prejudice.

Juvenile Justice worker; and Alex Ford, Johnson's supervisor. After hearing these testimonies, the district court granted the Commonwealth's motion, finding that a transfer was justified because of the seriousness of the offense; the defenselessness of the nine-year-old victim; Fuller's prior record; the best interest of the child and community; and the slim likelihood that Fuller, who was eighteen at the time of this hearing, could be rehabilitated through the juvenile justice system. Following this transfer, on March 16, 2005, a Pendleton County Grand Jury indicted Fuller on one count of sodomy in the first degree.

The Pendleton Circuit Court held Fuller's trial on February 7, 2006, at which time Fuller was twenty years old. Following the presentation of evidence, the jury found Fuller guilty of first-degree sodomy and recommended that Fuller receive the minimum sentence of twenty years imprisonment. On April 26, 2006, the circuit court entered its final judgment convicting Fuller of first-degree sodomy and sentencing him to twenty years in prison in accordance with the jury's recommendation. This appeal followed.

## **ANALYSIS**

### **I. Because the Recording of the Child Witnesses' Testimonies Pursuant to KRS 421.350(3) Was a Preliminary Proceeding Where Jeopardy Did Not Attach, Fuller Was Not Tried Twice For Sodomy and Did Not Suffer Double Jeopardy.**

Kentucky Revised Statute 421.350(3) permits a trial court, upon motion by a party and a finding of compelling need, to order the testimony of a child witness in certain sex-offense cases to "be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in

the proceeding.” Pursuant to this statute, the Pendleton County Attorney moved to take and record the testimonies of D.R. and D.B., child witnesses, at a preliminary proceeding on November 16, 2004, for introduction at an adjudicatory hearing scheduled for December 9, 2004. Notwithstanding the understanding by all involved that this testimony was being recorded for subsequent use at the adjudication, Fuller argues on appeal that by conducting the KRS 421.350 “hearing,” the trial court inadvertently commenced the adjudicatory hearing, subjected Defendant Thomas Fuller to jeopardy, and thus precluded Fuller’s transfer to circuit court for trial as an adult. Because jeopardy did not attach at what was clearly a preliminary proceeding, we disagree.

In Serfass v. United States, 420 U.S. 377 (1975), the United States Supreme Court explained that

[a]s an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of ‘attachment of jeopardy.’ . . . In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn . . . . In a nonjury trial, jeopardy attaches when the court begins to hear evidence . . . . The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is ‘put to trial before the trier of facts, whether the trier be a jury or a judge.’

Id. at 388 (citations omitted). This rule applies to the states through the Fourteenth Amendment. Crist v. Bretz, 437 U.S. 28 (1978). Being “put to

trial,” of course, does not occur until the trier of fact is authorized to decide the issue of the defendant’s guilt, and thus

[i]t is . . . true that many preliminary proceedings and motions, where evidence is received, do not amount to jeopardy. Thus, a preliminary hearing does not put the defendant in jeopardy . . . . So also, a motion to suppress evidence, in which testimony is taken from both sides, does not place the defendant in jeopardy . . . . Double jeopardy does not occur in such cases because the court is not deciding the general issue—guilt *vel non*.

United States v. Hill, 473 F.2d 759, 763 (9<sup>th</sup> Cir. 1972) (citations omitted).

Here, the November 16, 2004 proceeding was not a hearing at all, as the court was not being asked to decide even a preliminary question, much less the general question of the defendant’s guilt. The proceeding was more in the nature of a deposition at which testimony was being preserved and at which the court presided, not to hear the evidence, but only to ensure compliance with KRS 421.350 and to make evidentiary rulings. Although the case law on the point is scant, owing no doubt to the fact that the point is seldom disputed, it is nonetheless beyond cavil that jeopardy does not attach at a deposition, even one at which the trial court presides. Blondes v. State, 314 A.2d 746 (Md. App. 1974) (overruled on other grounds by Blondes v. State, 330 A.2d 169 (Md. 1975)).

Furthermore, it is clear that the trial court in this case believed that the November 16 KRS 421.350(3) proceeding was not the commencement of the adjudicatory hearing scheduled for December 9 but rather a mere preparation for it. It should also be noted that Fuller’s argument for jeopardy attaching at



the KRS 421.350(3) proceeding renders superfluous, at least in the case of bench proceedings, the statutory provision that the child witness' testimony be recorded, since according to Fuller the children's testimony is admitted into evidence when given, making the recording unnecessary. In fact, however, the statute makes no distinction between bench and jury proceedings and clearly contemplates that the testimony will be recorded and only later introduced at the adjudicatory hearing or trial, subject then, presumably, to RCr 7.20. Because standard precedent concerning the attachment of jeopardy and the plain terms of KRS 421.350(3) support the conclusion that jeopardy did not attach at the November 16, 2004 proceeding, Fuller's double jeopardy rights were not violated and he is not entitled to a reversal on this basis.

**II. Because the Grand Jury Indicted Fuller As a Youthful Offender As Defined in KRS 635.020(2), The Circuit Court Acted Properly In Not Remanding Fuller's Case Back to District Court.**

After the district court transferred Fuller's case to circuit court, a Pendleton County Grand Jury indicted Fuller on only one count of sodomy in the first degree, a Class A felony in this case because the victim was under twelve years of age. KRS 510.070. Following this indictment, Fuller filed a motion requesting that the circuit court remand his case back to district court. Citing KRS 640.010(3), Fuller claimed that he was entitled to a remand because the grand jury had indicted him on "another offense" that was different from the offenses charged in his juvenile petition. Although a specific order denying this motion is not included in the record, the Pendleton Circuit Court never remanded Fuller's case, and on February 7, 2006, tried Fuller as a

youthful offender for his charge of sodomy in the first degree.<sup>2</sup> Fuller now argues on appeal that because the grand jury indicted him on a charge that was less serious than what the district court considered in its decision to transfer—ten counts of sodomy and ten counts of sexual abuse—his case should have been remanded back to district court for reconsideration of the decision to transfer. However, because Fuller was charged with a Class A felony (first-degree sodomy) and was fourteen years old when he committed the offense, Fuller was still indicted as a youthful offender as defined in KRS 635.020(2), and thus, the trial court did not err in refusing to remand his case back to district court.

KRS 640.010(3) provides:

If the child is transferred to Circuit Court under this section and the grand jury does not find that there is probable cause to indict the child as a youthful offender, as defined in KRS 635.020(2), (3), (5), (6), (7), and (8), but does find that there is probable cause to indict the child for another criminal offense, the child shall not be tried as a youthful offender in Circuit Court but shall be returned to District Court to be dealt with as provided in KRS Chapter 635.

As referenced in the above statute, KRS 635.020(3) defines one way in which a child can be indicted as a youthful offender. KRS 635.020(3) states that if a child charged with a Class A felony had attained the age of fourteen at the time

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<sup>2</sup> The Commonwealth argues that because Fuller never sought a specific ruling from the trial court on this issue, it is not preserved for appellate review and may only be reviewed by this Court for palpable error. Bratcher v. Commonwealth, 151 S.W.3d 332, 350 (Ky. 2004). While it is correct that the party seeking relief must insist on a ruling from the trial court in order to properly preserve the issue on appeal, Fuller's failure to follow this procedural requirement is insignificant because the trial court did not err in this instance, palpable or otherwise.

of the alleged offense, the court shall proceed against the child as a youthful offender. Here, the grand jury indicted Fuller with first degree sodomy, a Class A felony, which occurred when Fuller was at least fourteen years old. The grand jury therefore found that there was probable cause to indict Fuller as a youthful offender, which rendered the remand requirement of KRS 640.010(3) inapplicable. See Osbourne v. Commonwealth, 43 S.W.3d 234, 238 (Ky. 2001) (holding that a remand is required only when the grand jury does not find probable cause to indict the child as a youthful offender under KRS 635.020(2), (3), (5), (6), (7), and (8)).

Fuller relies primarily on Phelps v. Commonwealth, 125 S.W.3d 237 (Ky. 2004), to further his argument that a circuit court is required to remand back to district court when the grand jury indicts on less severe offenses than the district court considered. However, Phelps, *supra*, does not support such a holding and is distinguishable from Fuller's case. In that case, after transfer to circuit court, the grand jury indicted Phelps on three counts—the unauthorized use of a motor vehicle, second offense; carrying a concealed deadly weapon after having been previously convicted of a felony; and being a felon in possession of a handgun—all of which were enhanced due to Phelps' previous juvenile convictions in district court. *Id.* at 238-239. In remanding Phelps' case back to district court, this Court held that a grand jury should not be able to use "a juvenile's prior adjudications in a juvenile session of district court . . . to enhance offenses [brought in circuit court] that require a prior conviction." *Id.* at 240. Conversely, in Fuller's case, his single grand jury indictment for

sodomy was not enhanced by any prior juvenile conviction and was based entirely on the same conduct that gave rise to his juvenile petitions. Therefore, having found that Fuller was properly tried as a youthful offender in circuit court, the trial court did not err in failing to remand his case back to district court.

### **III. Fuller Experienced Neither a Prejudicial Pre-Indictment Delay Nor a Violation of His Right to a Speedy Trial.**

Fuller acknowledges in his brief that the issue of pre-indictment delay and violation of his speedy trial right was not raised to the trial court and requests that this Court review the claim for palpable error pursuant to RCr 10.26. Thus, Fuller is entitled to a reversal on this basis only if he shows that these delays produced a “probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). Finding that the delay prior to Fuller’s transfer to circuit court and prior to his trial did not violate any of Fuller’s constitutional rights, we decline to grant Fuller a new trial on this basis.

When analyzing an alleged violation of a defendant’s constitutional right to a speedy trial, this Court measures the length of delay from the earlier of either the date of the indictment or the date of the arrest. Dunaway v. Commonwealth, 60 S.W.3d 563 (Ky. 2001). However, according to KRS 610.190, a juvenile is not “arrested” simply by being detained in a juvenile facility. Rather, taking a juvenile into custody “shall not be termed an arrest until the court has made the decision to try the child in Circuit or District

Court as an adult.” KRS 610.190. An application of KRS 610.190 to this case means that Fuller was not “arrested” until his transfer to circuit court, which was complete after the grand jury indicted him with sodomy in the first degree. Although Fuller’s juvenile petitions were filed on December 18, 2003, his right to a speedy trial as enumerated in Section 11 of the Kentucky Constitution and in the Sixth Amendment to the United States Constitution was not implicated until March 16, 2005, the date the grand jury issued its indictment against Fuller. Thus, the length of delay relevant to Fuller’s constitutional right to a speedy trial is the eleven-month time period between Fuller’s March 16, 2005 grand jury indictment and Fuller’s February 7, 2006 trial.

Despite this application of KRS 610.190, Fuller argues on appeal that his constitutional right to a speedy trial was violated due to a different delay: Fuller complains that the eleven-month period between the filing of the Commonwealth’s juvenile petition, which occurred on December 18, 2003, and the filing of the Commonwealth’s motion to transfer him to circuit court, which occurred on November 15, 2004, violated his right to a speedy trial. However, as noted above, Fuller’s constitutional right to a speedy trial did not attach in this case until his transfer to circuit court was complete upon the issuance of the indictment by the grand jury. KRS 610.190. Thus, the delay Fuller focuses on is actually a pre-indictment delay rather than a speedy trial violation. Although an unjustified and prejudicial pre-indictment delay can constitute a due process violation, in order to be entitled to a new trial, a defendant must show that the delay caused substantial prejudice and was an

intentional tactic used by the Commonwealth. Kirk v. Commonwealth, 6 S.W.3d 823, 826 (Ky. 1999); Reed v. Commonwealth, 738 S.W.2d 818, 820 (Ky. 1987).

Fuller argues that the Commonwealth's delay in filing its motion for transfer caused him prejudice because the district court, in considering whether to transfer him to circuit court, believed there were fewer available treatment and rehabilitation options when Fuller was eighteen than there would have been when he was sixteen. Although the district court did presume that Fuller, as an eighteen-year-old, would have a slim likelihood of rehabilitation in a juvenile detention center, the fact remains that the district court relied on several other factors to support its decision to transfer, including the seriousness of Fuller's offense, the defenselessness of the nine-year-old victim, Fuller's prior record, and the best interest of the child and community. Therefore, it cannot be said that this delay amounted to substantial prejudice. Fuller also argues that the Commonwealth's delay prevented him from being able to seek expert assistance during his transfer hearing. Despite this contention, Fuller has not shown specifically how an expert would have aided his argument for remaining in district court.

Even if Fuller were able to show that he suffered substantial prejudice by the pre-indictment delay, there is no evidence that such a delay was an intentional tactic used by the Commonwealth and no evidence to suggest that the Commonwealth was unreasonable in requesting continuances to allow for additional discovery. Therefore, the pre-indictment delay between the filing of

Fuller's juvenile petitions and motion to transfer did not constitute a violation of Fuller's due process rights and is not a basis for reversal.

Although Fuller did not argue that the eleven-month time period between his March 16, 2005 grand jury indictment and his February 7, 2006 trial in circuit court constituted a violation of his constitutional right to a speedy trial, this Court briefly notes that because this delay was not presumptively prejudicial, Fuller's right to a speedy trial was not violated. The U.S. Supreme Court has set forth a four-factor analysis to determine if a defendant's right to a speedy trial has been violated. Barker v. Wingo, 407 U.S. 514 (1972). However, this analysis is only implicated if the court first finds that the length of delay is "presumptively prejudicial." Id. at 530; Gerlaugh v. Commonwealth, 156 S.W.3d 747, 750 (Ky. 2005). The eleven-month delay in this case is not presumptively prejudicial. Brown v. Commonwealth, 934 S.W.2d 242, 248-249 (ten-month delay not presumptively prejudicial); Dunaway, 60 S.W.3d at 569 (thirteen and one-half month delay presumptively prejudicial); Soto v. Commonwealth, 139 S.W.3d 827, 843-844 (Ky. 2004) (slightly less than one-year delay borders on presumptively prejudicial at best); Powell v. Commonwealth, 237 S.W.3d 570, 573-574 (Ky. App. 2007) (eleven-month delay not presumptively prejudicial). Because Fuller has not asserted any other claim of prejudice, we need not address the remainder of the Barker analysis. Gerlaugh, 156 S.W.3d at 750. In sum, Fuller's right to a speedy trial was not violated.

#### **IV. The Trial Court Did Not Err When It Allowed the Commonwealth to Introduce Evidence of Fuller's Prior Abuse of D.R.**

During trial, the Commonwealth introduced D.R.'s previously recorded testimony, where D.R. revealed that from the time she was seven years old until she was approximately nine and a half, Fuller sexually abused her on a regular basis. D.R. stated that some form of abuse occurred practically every day and that Fuller forced her to put her mouth on his penis approximately three or four times a week. Prior to trial, the Commonwealth submitted a motion in limine requesting permission to introduce this KRE 404(b) evidence, arguing that D.R.'s testimony was admissible because it showed Fuller's intent, opportunity, plan, knowledge, identity, and absence of mistake in sexually abusing D.R., and because it was inextricably intertwined with the Commonwealth's other evidence. Fuller objected to this motion, contending that the Commonwealth should only be allowed to offer proof of the one instance of sexual abuse referred to in the indictment and that the other acts of misconduct mentioned in D.R.'s testimony may have occurred during a time when Fuller would not have qualified for transfer to circuit court. After hearing arguments on this motion, the trial court agreed with the Commonwealth and granted its motion to introduce evidence of Fuller's prior acts of sexual abuse.

Contending that the trial court violated KRE 404(b) in allowing this evidence to be admitted, Fuller now argues that this portion of D.R.'s testimony was inadmissible because it was not evidence of the specific crime for which he was charged, but rather, was evidence of his prior criminal conduct. We disagree. Although evidence of a defendant's prior bad acts is inadmissible to



prove that the defendant acted in conformity with his bad character, such evidence can be introduced if it is “offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .” and if its probative value outweighs its prejudicial effect on the defendant. KRE 404(b); KRE 403. A trial court’s decision to admit this evidence is reviewed on appeal according to the abuse of discretion standard, which means the trial court’s ruling will not be disturbed unless it was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

In prior sexual abuse cases, this Court has held that pursuant to KRE 404(b), a victim’s testimony that she had been sexually abused by the defendant on more than one occasion was properly admitted “to prove intent, plan or absence of mistake or accident.” Noel v. Commonwealth, 76 S.W.3d 923, 931 (Ky. 2002) *citing* Price v. Commonwealth, 31 S.W.3d 885, 888 n.4 (Ky. 2000). Indeed, “evidence of similar acts perpetrated against the same victim (is) almost always admissible for those reasons,” 76 S.W.3d at 931. As in Noel, *supra*, in this case, the evidence that Fuller repeatedly sexually abused D.R. was relevant to show Fuller’s opportunity, intent, preparation and plan to sexually assault D.R. in November or early December of 2002, the date specified in the indictment. D.R.’s descriptions of what preceded those months demonstrated the abusive pattern of conduct that existed between Fuller and D.R. and certainly made it more likely that Fuller sexually abused D.R. as charged in the indictment. Furthermore, because D.R. had difficulty

identifying the exact dates of the abuse, her testimony of Fuller's repeated misconduct was integral to her statements regarding the specific abuse charged by the grand jury.

Despite Fuller's contention, the prejudicial effect of this portion of D.R.'s testimony does not outweigh its probative value. As noted above, evidence that Fuller repeatedly subjected D.R. to the same abusive conduct for which he was charged is strongly probative of his guilt. Even though D.R.'s testimony is prejudicial, the fact remains that such prejudice is unavoidable when the victim is describing the abuse she endured at the hands of the defendant. Nonetheless, because the probative value outweighs the prejudicial effect of this testimony, it was admissible under the exceptions listed in KRE 404(b). Therefore, the trial court did not act arbitrarily or unreasonably in permitting the Commonwealth to introduce this portion of D.R.'s testimony, and Fuller is not entitled to a new trial on this basis.

**V. The Trial Court Did Not Err In Allowing Detective Jaskowiak and Vicki Henderson To Testify As To D.R.'s Demeanor During Her Interview.**

Before the Commonwealth called Detective Jaskowiak and Vicki Anderson as witnesses, Fuller objected to the introduction of any evidence of D.R.'s physical demeanor during her interviews that took place at the Children's Advocacy Center. The trial court disagreed, however, and permitted the Commonwealth to proceed with such testimony as long as the witnesses did not give any opinion as to the truthfulness of the victim's statements. Detective Jaskowiak then testified that after D.R. originally revealed her allegations of sexual abuse, he took her to the Children's Advocacy Center of

Northern Kentucky, where Vicki Henderson interviewed her. Jaskowiak stated that in the beginning of this first interview, D.R. was open and interactive, but that she became guarded as Ms. Henderson began asking about the sexual abuse. Although D.R. was unable to continue this interview, she returned to the Center several months later to resume her interview with Ms. Henderson. Detective Jaskowiak stated that during this second interview, D.R. gave a complete statement.

The Commonwealth then called Ms. Vicki Henderson. During her testimony, Ms. Henderson stated that she had been a forensic interviewer for several years and had specialized training in interviewing children who may have been abused. In describing her interviews with D.R., Ms. Henderson explained that the first interview ended with D.R. being upset and unwilling to talk about any alleged abuse, but that during the second interview, D.R. answered all her questions completely. The Commonwealth then asked Ms. Henderson if all the children she interviews are victims of sexual abuse. Fuller objected to this question, but the trial court overruled the objection. Ms. Henderson then responded that not all the children she interviews are victims, explaining that “children come to our center because there is a concern of possibly something, but we do not assume that the children that are brought to our center have been abused.”

Fuller argues on appeal that Detective Jaskowiak’s and Ms. Henderson’s testimonies were improperly admitted because they did nothing more than bolster D.R.’s credibility. Fuller contends that even though the Commonwealth

never asked Ms. Henderson to comment directly on D.R.'s truthfulness, she was nonetheless "given a platform from which to testify about the techniques she employs to ensure that the statements she does obtain are truthful." We find this argument to be without merit. In her testimony, Ms. Henderson did nothing more than explain to the jury her qualifications and interviewing techniques, which was proper and did not serve to bolster D.R.'s testimony. Furthermore, KRE 701 permits a witness to testify as to his or her observations or perceptions of a subject if it would help the jury determine a fact in issue. Here, Detective Jaskowiak and Ms. Henderson simply stated that D.R. became upset and guarded as the questions in her first interview approached the subject of sexual abuse, but that D.R. was able to give a complete statement during her second interview. This evidence of D.R.'s demeanor was minimal, did not express an opinion as to the truthfulness of D.R.'s allegations, and cannot be said to have improperly bolstered D.R.'s credibility.

Lastly, the evidence of D.R.'s demeanor during her interviews was not unfairly prejudicial in violation of KRE 403. As explained above, the testimony that D.R. became uncomfortable when confronted with questions about sexual abuse was insignificant in the overall proof presented at trial and did not improperly suggest that D.R. had made a prior statement consistent with her testimony. Thus, the trial court did not abuse its discretion in permitting Detective Jaskowiak and Ms. Henderson to testify about D.R.'s demeanor.

## CONCLUSION

Fuller did not suffer double jeopardy because the recording of D.B.'s and D.R.'s testimonies pursuant to KRS 421.350(3) was a preliminary proceeding in which jeopardy did not attach. Fuller was not entitled to have his case remanded back to district court after the grand jury indicted him only on a single charge because he was properly indicted as a youthful offender as defined in KRS 650.020(2). In addition, the period of time between the filing of Fuller's juvenile petition and his trial in circuit court did not constitute a prejudicial pre-indictment delay or a violation of Fuller's right to a speedy trial. Lastly, the trial court did not err in allowing the Commonwealth to introduce evidence of Fuller's prior abuse of D.R. and evidence of D.R.'s demeanor during her interviews at the Children's Advocacy Center. Therefore, Fuller's April 19, 2006 Judgment of the Pendleton Circuit Court convicting him of sodomy in the first degree and sentencing him to twenty years in prison is affirmed.

Minton, C.J.; Abramson, Cunningham, Scott and Venters, JJ., concur. Noble, J., dissents by separate opinion in which Schroder, J., joins. Schroder, J., dissents by separate opinion in which Noble, J., joins.

NOBLE, JUSTICE, DISSENTING:

I join in Justice Schroder's excellent dissent.

I write separately to address the language in the majority which states, "The proceeding was more in the nature of a deposition at which testimony is being preserved and at which the court presided, not to hear evidence, but only to ensure compliance with KRS 421.350 and to make evidentiary rulings." The

majority holds that the November 16, 2004 proceeding was not a part of the adjudicatory hearing, even though that was the stated reason for having it, but rather it was a preservation of testimony for the Youthful Offender proceeding which would go forward in circuit court. That is not correct, and if the proceeding was not properly being conducted for such a purpose, then it could only be a juvenile proceeding.

First, in a criminal trial, proof may be presented by “deposition” only on certain grounds when ordered by the trial court as allowed under KRS 421.350 or pursuant to RCr 7.10. The trial court for purposes of the criminal case here would be the circuit court, which did not enter the order for the KRS 421.350 proceeding. KRS 421.350, by its very language, can be used only “in the prosecution of an offense”; requires the trial court to make a finding of “compelling need,” which is defined as “the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant’s presence”; and requires that the defendant be allowed to hear the testimony of the child in person, though out of the child’s sight or hearing. If the trial court orders testimony to be taken under KRS 421.350(3), which allows recorded testimony, the child witness “may not be required to testify in court at the proceeding for which the testimony was taken . . . .” KRS 421.350(4). This statute prescribes a procedure of the type approved by the United States Supreme Court’s ruling in Maryland v. Craig, 497 U.S. 836 (1990). The intention behind it was to protect a child sexual abuse witness from having to testify in the intimidating presence

of the accused, while at the same time protecting the accused's right to confrontation in a criminal trial. It is not intended to be used as a deposition to preserve testimony.

In fact, D.R. and D.B. did testify at the trial in the circuit court. The record is clear that this proceeding was intended by all parties for use in a juvenile adjudicatory proceeding, not in a felony criminal trial. The Commonwealth had no thought of "preserving testimony" and in fact had the children testify live, which, if the earlier recording was for purposes of the criminal trial, is contrary to the plain language of the KRS 421.350(3). Certainly, the commonwealth attorney could not delegate his role in making the motion required by KRS 421.350, and taking the testimony, to the county attorney. And certainly this could not be done before the Appellant was indicted upon the commonwealth attorney's presentation of evidence of probable cause to the grand jury. Further, there is no authority for the district court to make a ruling on the county attorney's motion for the benefit of the circuit judge. Nor is there authority for the district court, a separate constitutionally established court with separate non-overlapping jurisdiction from the circuit court, to conduct a KRS 421.350 proceeding on behalf of the circuit court.

KRS 421.350 could not apply for purposes of preserving testimony because the commonwealth attorney did not make the motion required by the statute; the testimony was taken before Appellant was transferred to circuit court, let alone indicted; he was not present in person; D.R. and D.B. testified

at trial; and the trial court judge did not enter the order and make the requisite findings.

Even if the proceeding should not have occurred once the motion to transfer was filed, a transfer motion requires the county attorney to consult with the commonwealth attorney to make both of them aware of what is happening in the case until transfer is completed. Presumably, they did so in this case. Yet, the county attorney went ahead with the proceeding and took testimony which was subject to cross-examination and evidentiary rulings by the district court. Until transfer actually occurs, the county attorney retains the right to accept an alternative disposition. The testimony could be used against Appellant since the transfer did not occur until a month later. In any event, a state statutory requirement cannot override the Constitutional guarantee against double jeopardy.

Second, if KRS 421.350 does not apply, testimony can only be preserved pursuant to RCr 7.10 in a criminal trial. This rule states specific grounds which must be contained in the court's order: that a witness may be unable to attend; is or may be prevented from attending; may become a non-resident of the Commonwealth; the testimony is material; and that it is necessary to take the witness's deposition in order to prevent a failure of justice. None of this applies here. The court's order must be obtained for the purposes stated by motion and notice to the parties. Further, while the rule does allow for the taking of a deposition for use at trial by agreement of the parties when the stated grounds are not present, that did not occur here. In fact, counsel for



Appellant argued that he would not have agreed to the hearing if he had known it might be used for such a purpose. All of this assumes that such a motion could be made before the trial court in the felony case, and it is fatal here that the case was still in district court.

There is also the fact that the district judge presided at the proceeding and actually made evidentiary rulings. Trial courts do not preside at depositions, and obviously since the court could not help but hear the testimony, the adjudicatory proceeding was begun before the trier of fact in such a proceeding. It cannot reasonably be said that the judge was not there to hear the evidence when he ruled on it.

The facts of this case are revolting and tragic. Nonetheless, jeopardy did attach when the district court conducted part of the adjudicatory hearing prior to Appellant's transfer to circuit court for consideration by the grand jury. This case should be reversed.

Schroder, J., joins.

SCHRODER, JUSTICE, DISSENTING: I dissent because, under the facts and applicable law in this case, the adjudication proceeding<sup>3</sup> had already commenced in Juvenile Court. Thus, jeopardy attached and the Juvenile Court could not subsequently conduct a transfer hearing.<sup>4</sup> Accordingly, it is my view that the transfer to Circuit Court violated Appellant's right against

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<sup>3</sup> See KRS 635.010 et seq.

<sup>4</sup> See KRS 640.010; 635.020.

double jeopardy under the United States Constitution and §13 of the Kentucky Constitution.

In Breed v. Jones, 421 U.S. 519, 522-24 (1975), which was conveniently ignored by the majority, the defendant was tried as an adult after an adjudicatory hearing in juvenile court in which it was determined that the defendant had committed the criminal offense and was unfit for treatment as a juvenile. The Court held that jeopardy attached at the adjudicatory hearing when the juvenile court, as trier of fact, began to hear evidence. Id. at 531. Thus, the defendant's subsequent prosecution as an adult violated the Double Jeopardy Clause. Id. at 541.

In Sharp v. Commonwealth, 559 S.W.2d 727, 728 (Ky. 1977), this Court held that jeopardy did not attach when a transfer hearing was conducted determining that there was probable cause to believe that the offense was committed and that the juvenile committed the offense. This Court reasoned that the hearing "was not a proceeding that could possibly have resulted in adjudication of guilt or punishment" and was "harmonious with, rather than in contravention of, the requirements of Breed . . ." Id. (citation omitted).

KRS 421.350(3) and (4) provide in pertinent part:

(3) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. . . .

(4) If the court orders the testimony of a child to be taken under subsection (2) or (3) of this section, the

child may not be required to testify in court at the proceeding for which the testimony was taken.

The videotaped or televised testimony under Sections (3) and (4) of KRS 421.350 “is the functional equivalent of testimony in court.” Commonwealth v. Willis, 716 S.W.2d 224, 228 (Ky. 1986). The videotape recording of the hearing in the present case was in lieu of D.R.’s and D.B.’s live testimonies at Appellant’s adjudication hearing in the Juvenile Court. While KRS 421.350 does not even provide for the presence of the court in the hearing, the District Court judge, who is the fact finder in a juvenile proceeding, presided over the KRS 421.350 hearing in this case, ruled on motions, and heard the testimonial evidence from D.R. and D.B. Appellant’s counsel fully cross-examined D.R. and D.B. and, in so doing, revealed Appellant’s defense theory (that D.R. made up the story so she could be permanently removed from her mother’s home). As proscribed by the Supreme Court, Appellant “was twice put to the task of marshaling his resources against those of the State . . . .” Breed, 421 U.S. at 533. Although the adjudicatory hearing had not been completed, the Supreme Court made clear that jeopardy attached “when the Juvenile Court, as trier of fact, began to hear evidence.” Id. at 531 (emphasis added). In my view, the KRS 421.350 hearing marked the beginning of a proceeding in which the adjudication of guilt or punishment could have resulted. Accordingly, the subsequent trial in Circuit Court violated Appellant’s Constitutional right against double jeopardy.

It is of no consequence that the motion to transfer was filed prior to the KRS 421.350 hearing. The Breed Court stated, “We agree that such a holding

will require, in most cases, that the transfer decision be made prior to an adjudicatory hearing.” Id. at 535-36 (emphasis added). Although the transfer motion here was filed before the KRS 421.350 hearing, the transfer decision was not made until almost a month after the KRS 421.350 hearing. Moreover, Appellant’s counsel was not aware of the transfer motion at the time of the KRS 421.350 hearing and maintains that he would not have agreed to such hearing had he known about the transfer motion.

The Commonwealth argues that pursuant to language in KRS 635.020 and KRS 640.010(2), once the transfer motion was filed, the District Court no longer had authority to hold an adjudicatory hearing. KRS 635.020(2) and (7) both provide in pertinent part:

[T]he court shall, upon motion of the county attorney made prior to adjudication, and after the county attorney has consulted with the Commonwealth's attorney, that the child be proceeded against as a youthful offender, proceed in accordance with the provisions of KRS 640.010.

KRS 640.010(2) states in part:

In the case of a child alleged to be a youthful offender by falling within the purview of KRS 635.020(2), (3), (5), (6), (7), or (8), the District Court shall, upon motion by the county attorney to proceed under this chapter, and after the county attorney has consulted with the Commonwealth’s attorney, conduct a preliminary hearing to determine if the child should be transferred to Circuit Court as a youthful offender.

True, the motion to transfer was filed before the beginning of the adjudicatory process in this case. However, the District Court judge may not have been aware of the transfer motion at the time of the KRS 421.350 hearing,

since it was filed just the day before the hearing. Further, it is well established that the District Court continues to have jurisdiction in a juvenile matter until the transfer to Circuit Court is complete. KRS 640.010(2)(c); Johnson v. Commonwealth, 606 S.W.2d 622, 623 (Ky. 1980). And the fact remains that before the transfer hearing was held, the District Court began the adjudicatory process with the KRS 421.350 hearing and Appellant was placed in jeopardy with that hearing.

We also note that this was not a case where transfer after the adjudicatory hearing was arguably permissible because the information on which the transfer was based could not, by the exercise of due diligence, have been known to the Commonwealth at the time of the adjudicatory hearing. See Breed, 421 U.S. at 539, n.20; Illinois v. Somerville, 410 U.S. 458 (1973). There was no such allegation by the Commonwealth in this case.

Accordingly, I would reverse the judgment of the Pendleton Circuit Court and remand the case to the Pendleton District Court.

Noble, J., joins.

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